#2017-108 Expedited Hearing Granted

Nova Dubovik <ndubovik@utah.gov>

Records request appeal

1 message

Brian Maffly <bmaffly@sltrib.com> Tue, Oct 17, 2017 at 3:08 PM
To: ndubovik@utah.gov

Hello Ms. Dubovik,

Attached is an appeal the Salt Lake Tribune is filing to challenge Kane County's refusal to release records we feel are public regarding the Interior Department's monuments review. Please let call if you have any questions. Thank you.

–

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KaneRecordsCommitteeAppeal.pdf
149K

Utah State Records Committee
GRAMA Appeal
Attn: Nova Dubovik
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Phone: 801-531-3834
Via E-Mail

October 17, 2017

To whom it may concern:

On Aug. 25, 2017, The Salt Lake Tribune filed a Government Records Access and Management Act request to Kane County and Garfield County, seeking "any maps prepared by your county, as well as any correspondence regarding the Grand Staircase-Escalante National Monument sent or received since Jan. 1, 2017, between county commissioners or county staff and any of the following entities: The Utah governor's office or staff, The Public Lands Policy Coordinating Office or staff, any Utah legislator, any employee of the U.S. Department of Interior or the White House, any member of Congress or congressional staff, any Garfield County commissioner or Garfield County staff." (Letter attached)

On Sept. 12, Kane County responded by providing a number of documents but withheld a series of maps for proposed revisions to the monument, citing Utah Code 63G-2-305(22) & (57). Those provisions protect drafts of documents and documents provided to the Public Lands Policy Coordinating Office, respectively.

On Sept. 25, The Tribune appealed that decision (Letter attached) and on Oct. 11, Rhonda Gant denied that appeal on behalf of Kane County, restating the two GRAMA exemptions as a basis for the denial (Letter attached).

The Tribune appreciates the diligence of Kane County in providing the material requested, but disagrees with Kane County's interpretation of the GRAMA statute and believes that the release of all 18 maps serves an important public interest on an issue

vital to constituents of Kane County and citizens of the State of Utah, and asks that the State Records Committee order the release of the aforementioned records.

The Kane County Maps:
According to Gant's denial of The Tribune's appeal, Kane County has stipulated that the county is in possession of 18 maps, created pursuant Resolution R2017-1 (attached), which directed Kane, in consultation with Garfield, the State of Utah, and the U.S. Department of Interior's Bureau of Land Management to "create mapping that indicates the minimum acreage necessary to protect the antiquities and objects identified in Presidential Proclamations 6920" (the proclamation that established the Grand Staircase-Escalante National Monument).

The county contends all 18 maps "are in draft form, do not contain any empirical data, have not been finalized in any way, and have not been relied on by the County or any County officials to carry out any action or policy." The county concedes that "a few" of the maps have been shared with PLPCO and Garfield County. One map was shared with Interior Secretary Ryan Zinke when he visited Kane County to inspect the monument pursuant Executive Order 13792, which directed the secretary to review monument designations made in the last 21 years to determine if they complied with the Antiquities Act.

The Tribune contends that all 18 maps are public documents and that Kane County inappropriately withheld the records for the following reasons:

1. The maps were improperly classified as drafts
Kane County argues that all 18 maps are "temporary drafts" pursuant Utah Code 63G-2-305(22), which states: "'Record' does not mean... a temporary draft or similar material prepared for the originator's personal use or prepared by the originator for the personal use of an individual for whom the originator is working."

The draft exemption does not apply in this case because the maps were prepared pursuant a resolution by the county commission, a public body, for a public purpose and therefore are not for the "originator's personal use."

This interpretation would be consistent with repeated decisions by the Records Committee, including it's ruling last year in Black v. Lehi City Police, (Case No. 16-15, attached) where the Committee unanimously held that interview notes should be classified as public records because the notes were prepared exclusively in an official government capacity and were not for the "personal use" of the originator.

Nor were the maps prepared as the basis or foundation of any future official action by the county. Indeed, as the resolution states, the maps were an end to themselves, a final product produced at the direction of the county commission. Indeed, the county acknowledges that the designation of national monuments is a discretionary power provided to the president by Congress, "which results in the State and the County essentially having no jurisdiction, authority, or power over the designation and size of the monument."

Subsequent to the county's resolution, the maps became the basis for advisory recommendations from the county regarding its wishes for the future of the monument based on the review ordered by President Donald Trump on April 26, 2017. As the county acknowledges, county officials shared a version of the map with Interior Secretary Ryan Zinke when he visited the monument May 11, 2017. Subsequently, Secretary Zinke submitted his report responsive to the presidential order on Aug. 24, 2017. As such, even if they once were properly classified as drafts, upon submission by the county and final action by the secretary, the maps can no longer be appropriately classified as draft documents.

Finally, and more fundamentally, the maps were prepared at the behest of elected officials of Kane County, using taxpayer funds, for an exclusively public purpose. The citizens of Kane County and the State of Utah have a basic right to know how money is being spent by elected officials. That is the essence of the state's open-records law.

2. Even if the maps were drafts, they should be released

Under 63G-2-305(22), there are conditions in which drafts are classified as public records. According to guidance from the Utah State GRAMA Ombudsman (attached) (https://archives.utah.gov/opengovernment/classifying-drafts.pdf) those situations are:

"1. Empirical data contained in drafts if that data is not reasonably available elsewhere in a similar form and the governmental entity is given a reasonable opportunity to correct errors or make non-substantive changes.
2. Drafts that were circulated to anyone outside of the governmental entity and other entities, such as contractors, with which the entity is directly working.
3. Drafts that have not been finalized, but which were relied upon to carry out an action or policy."

Each of those three criteria appear to be met in this current appeal.

The county contends that the maps "do not contain any empirical data," an assertion that is, on its face, fundamentally incorrect. Maps are empirical data, showing boundaries, roads, rivers, geographic features, and thousands of other empirical data points. This specific empirical data — that is, the county's vision of the minimal monument boundaries — is "not reasonably available elsewhere in a similar form," and therefore the maps clearly fit the first criteria.

Second, the county acknowledges that the maps were shared with other entities. Copies of maps were shared with the Public Lands Policy Coordinating Office (PLPCO), with officials in Garfield County, and with Secretary Zinke and therefore fall into the second criteria.

And, as previously mentioned, the maps were created in response to the county commission's resolution and therefore are a final product. Moreover, they were provided to Secretary Zinke to help form the basis of the Interior Department's Aug. 24 response to the April 26 Executive Order.

It should be noted that, while all three conditions appear to be met in the present case, any one of the three would be grounds for ruling in favor of releasing the information.

3. The county distorts and misapplies the PLPCO exemption

In order to deny the Tribune's request, the county relies on a misrepresentation of exemption contained in Utah Code 63G-2-305(57) — a claim that, based on the record, doesn't apply in the current case.

First and foremost, there is no indication that any of the maps were ever actually shared with PLPCO. The Tribune filed a nearly identical GRAMA request in August with the Governor's office and PLPCO, specifically seeking copies of documents and maps relating to Grand Staircase and Bears Ears national monuments. The governor's counsel, also representing PLPCO on the request, provided copies of maps of the state's recommendation for new boundaries for the Bears Ears monument, and several maps of roads and other features in GSENM, but there were no maps of envisioned boundary changes for Grand Staircase.

Subsequent to Kane County's denial of the request for maps, citing the PLPCO exemption, The Tribune again contacted the Governor's counsel to ask if the office was also invoking the PLPCO exemption to withhold the maps and was told that the office did not withhold any maps and, indeed, did not have any record of every having received any maps. Likewise, in response to the request from Kane County, there was

no email or any other document that would indicate any maps were ever shared with anyone at PLPCO. Indeed, in the hundreds of pages of records obtained from PLPCO and Kane County, there was no correspondence whatsoever between the two, even though it was specifically requested, nor was there any mention of any documents aside from the maps that were withheld.

It would appear, then, that Kane County never shared any maps with PLPCO and, consequently, has no grounds to claim the GRAMA exemption in 63G-2-305(57).

Even if it did apply, Kane County is distorting and misapplying the exemption. The text of the statute allows records to be classified as protected if they are "provided or received by the Public Lands Policy Coordinating Office *in furtherance of any contract or other agreement made in accordance with Section 63J-4-603.*" (emphasis added)

The last part of the sentence — "in furtherance of any contract or other agreement" — limits the scope of the GRAMA exemption. Indeed, Section 63J-4-603 specifically refers to only two types of contracts or agreements. In section 1d(i), it refers to contracts and agreements with governmental entities "developing cooperative contracts and agreements ... for involvement in the development of public lands policies," and in subsection 3, PLPCO may enter into contracts or agreements generally related to state roads and RS2477 disputes.

Neither of the two criteria apply in the current matter. The maps were created pursuant to County Resolution 2017-1, not "in furtherance" of a contract or agreement for the development of public lands policies. Likewise, the information was not shared "in furtherance" of any contract or agreement as any part of any ongoing RS2477 roads dispute. The maps were, again, an end to themselves and, consequently, do not fit the narrow exemptions in 63G-2-305(57).

The county, in its denial of the appeal, misrepresents the plain language of Section 63J-4-603 by placing the "contracts and agreements" language in front of a general description of the duties of the Public Land Coordinator. Doing so would make it appear that the "contracts and agreements" exemption in 63G-2-305(57) applies to any of the PLPCO Coordinator's duties in in an apparent attempt to make it appear that the "contracts and agreements" exemption applies to any of the duties of the coordinator contained in 63J-4-603.

But that is not the way that the Legislature constructed the statute. Simply reading 63J-4-603 makes it clear that the statute was constructed to outline the coordinator's

broad duties. Among those duties, in subsection 1(d)i and in subsection 3(a-c), the director can enter into contracts or agreements in narrowly defined instances. In those instances, there may be an exemption to GRAMA, but, as discussed, neither instance applies in the present matter. The county doesn't get to simply rewrite state law. If we were to accept the county's revisionist reading, any record touched by PLPCO for any reason would gain a blanket exemption from GRAMA.

Moreover, the GRAMA exemption only applies to the extent that a contract or agreement actually exists. The county concedes in its letter that no such agreement was ever formally entered into: "Kane County entered into an agreement with PLPCO to exchange information and develop maps. Although *there was no formal written contract*, the county proceeded to work with PLPCO under this agreement." (emphasis added) Not only was there no formal agreement, as discussed above, there was nothing in the records produced by PLPCO or the county to indicate that there was even an informal agreement. The county should not be permitted to assert some vague, "informal," and fluid agreement to thwart the state's open records law.

Furthermore, it is unclear from the statute whether the county even has the authority to invoke the PLPCO exemption, which applies to "records provided or received by the Public Lands Policy Coordinating Office." If we assume — despite evidence to the contrary — that the records were received by the PLPCO office, it is reasonable to read the statute as allowing PLPCO to exercise the exemption, which it did not, but there is no indication that it allows the county to claim the exemption.

If, for argument's sake, the county did have the authority to invoke the PLPCO exemption, it explicitly waived that exemption by providing maps to parties outside of PLPCO, specifically to Garfield County and Secretary Zinke. There is no credible argument that either of those two entities enjoy any exemption and, therefore, Kane County's argument falls apart.

4. The county erred the weighing of interests

The county acknowledges that one map — the version provided to Secretary Zinke during his May visit — is a public document. But the county withheld the document based on a the misreading of what the county sees as competing statutory provisions and a flippant dismissal of the heart of the open records law, that is the public's fundamental right to know how public officials are conducting public business and using taxpayer resources.

On one side of the scales, the county contends, are the two statutes it cites for withholding the documents — the classification as drafts and the PLPCO exemption. As stated, the Tribune believes both provisions were misapplied, meaning there should be nothing remaining that would outweigh the public's right to know.

However, assuming that the committee determines the exemptions were not misapplied, the records should still be made public based on a good-faith weighing of the competing interests.

The county commission, in adopting its resolution directing the creation of the maps, did so acting as a duly elected legislative body in a public meeting. It is difficult to fathom, then, why the product of that resolution would not automatically be a public record available to the taxpayers of Kane County and the general public.

Moreover, the resolution calls on the Legislature and Congress to take steps to "support legislative action that will reduce and modify GSENM boundaries to the minimum area necessary to protect antiquities and objects identified" in the proclamation creating the monument. The map speaks directly to what, in the county's view, those boundaries should be.

The resolution states that the "boundary adjustments identified by Garfield and Kane Counties are essential to the protection of health, safety, welfare, prosperity, custom, culture and commercial opportunities for their citizenry." Put another way, the commission believes that, without the adjustments recommended in the map, the "health, safety, welfare, prosperity, custom, culture and commercial opportunities" of more than 12,000 residents of Kane and Garfield counties are in jeopardy.

That fact lends itself to a very compelling argument that those citizens — and all Utah citizens — should know what measures the county believes are necessary to protect the lives and livelihoods of those people. The public interests are paramount, and not something that should be dismissed off-hand, as the county does, when it says that "when viewed within the context of the current situation, they don't carry much weight."

The county attempts to diminish the public interest by arguing that the Interior Department makes the final decision on any proposed changes to the monument and the county's input "doesn't bear any great importance in the process." Nonetheless, the county's input was important enough in the commission's eyes that it passed a unanimous resolution to prepare the map and urge measures to shrink the monument to some minimal size.

Moreover, county commissioners have traveled to Washington to advocate for changes to the monument and met with Secretary Zinke encouraging him to reduce the size of the monument. The Utah State Legislature has taken similar actions, as has the governor of Utah and the director of PLPCO. If the input from these entities was unimportant, there would be no reason to expend the time and tax dollars in such a trivial pursuit.

The county's contention is that the public's fundamental right to know how it is being represented by government bodies and how those government officials act when the public's health and welfare are at stake is outweighed by a nebulous interest on the part of PLPCO and the county to operate in secrecy, which is at odds with the whole notion of government transparency.

The county also contends that there must be some degree of finalization to the maps, but the maps were finalized enough to provide the recommendations to Secretary Zinke in May. There is no indication from the county that, in the five months since, they maps have somehow become less finalized than they once were, or that they are less final than when Secretary Zinke sent his monument recommendations to the president in August. It seems that, from the county's interpretation, the maps exist in some records limbo, final enough to forward to the Interior Department, but not final enough to be shared with the citizenry. The county should not be allowed to have it both ways.

Conclusion

It is the contention of The Tribune that Kane County erred in its classification of the maps in question. They do not, under a plain reading of the statute, qualify to be considered as drafts. Even if they can — or could at one point — be considered drafts, they would clearly contain important empirical data; were, by the county's own admission, circulated to various parties outside of the county; and were the product of an official action and relied on as the basis for a recommendation from the county to the Interior Secretary. The county is attempting to apply an erroneous and overreaching interpretation of the statutory exemption afforded PLPCO to protect contracts and agreements, an exemption that PLPCO, itself, did not exercise and it is unclear if the county has the authority to invoke it now. And finally, even if the documents are drafts and there could be some reasonable argument that they could be classified as protected based on the PLPCO exemption, the weighing of the competing interests in this matter clearly favors public knowledge of issues that the county commission itself has said pertain directly to the health, welfare and prosperity of its citizens and the future of a 1.7 million acres of public land.

Accordingly, The Tribune requests request that the State Records Committee rule that the maps in question are public records under GRAMA and direct the county to provide copies to The Tribune in accordance with the law.

Thank you for your consideration of this appeal.

Sincerely,